Supreme Court, U.S.
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No. 95-993

In The

# Supreme Court of the United States

October Term, 1995

DANIELS, SALTZ, MONGELUZZI & BARRETT, LTD.,

*Petitioner,*

v.

ANN NEWCOMB and BRUCE NEWCOMB,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether a judicial decision violates the Commerce Clause of the United States Constitution when it declares a contract for Attorneys Fees unenforceable as contrary to the public policy of the State whose law governs the Contract?

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## STATEMENT OF THE CASE

The petitioners have petitioned for certiorari from an Order of the United States Court of Appeals for the Third Circuit entered on September 19, 1995. The Order affirmed an Order of the Chief Judge of the United States District Court for the District of New Jersey entered on December 8, 1994, granting Summary Judgement to the plaintiffs Ann Newcomb and Bruce Newcomb.

The plaintiffs had filed suit in the Superior Court of New Jersey seeking to reform a contract which they entered into with the defendants for legal services. This action was removed to the United States District Court on the application of the defendants.

The contract in issue provided that the defendant attorneys would represent the plaintiffs in a personal injury action for which the defendants would be paid a Contingent Fee of 40% of the gross recovery.

The plaintiffs filed suit to reform this contract alleging that it was invalid and unenforceable by reason of the fact that the contract under "Choice of Law" doctrine was subject to the application of New Jersey Law. The plaintiffs further alleged that if New Jersey Law was applied to this contract, it would be declared void as against public policy.

The Chief Judge of the United States District Court, the Honorable John F. Gerry, agreed with the plaintiffs and granted Summary Judgment. In arriving at his decision, the Chief Judge considered the uncontroverted facts regarding the issues in the case and determined that this

contract was subject to New Jersey Law under established Choice of Law Doctrine. His Honor further determined that he contract clearly violated New Jersey Public Policy and that pursuant to the New Jersey Common Law such violation would render the contract unenforceable. The United States Third Circuit Court of Appeals affirmed this decision.

Petitioners now seek review by the United States Supreme Court based on the theory that the Chief Judge's interpretation of this contract violates the Commerce Clause of the United States Constitution.

## REASONS TO DENY CERTIORARI

The Chief Judge ordered reformation of this contract because it violated the public policy of the State of New Jersey. He found that New Jersey has a strong interest in regulating the economic relationship between New Jersey attorneys and their clients in tort cases. See *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 126 N.J.Super. 577, 588, 316 A.2d 19, 24-25 (App. Div. 1974), aff'd, 66 N.J. 258, 330 A.2d 350 (1974); see also *Kingman v. Finnerty*, 198 N.J. Super. 14, 486 A.2d 342 (App. Div. 1984); *Bernick v. Frost*, 210 N.J. Super. 397, 510 A.2d 56 (App. Div. 1986).

He also noted that New Jersey's Contingent Fee Rules are designed to protect clients negotiating fee arrangements from the greater knowledge and bargaining power of their attorneys. (Appendix to petition for Writ of Certiorari page 9(b)). See *Bernick v. Frost*, 210 N.J. Super. 397 (App. Div. 1986).

The rule in question is Rule 1:21-7(c) which was adopted by the New Jersey Supreme Court in *1972* and has withstood the Scrutiny of Judicial Review. See *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 126 N.J. Super. 577, 588, 316 A.2d 19, 24-25 (App. Div. 1974), aff'd, 66 N.J. 258, 330 A.2d 350 (1974).

*The New Jersey Court Rule 1:21-7* provides:

> (c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:
>
> (1) 33 1/3% on the first $250,000 recovered;
>
> (2) 25% on the next $250,000 recovered;
>
> (3) 20% on the next $500,000 recovered. . . .
>
> (d) The permissible fee provided for in paragraph c shall be computed on the net sum recovered after deducting disbursement in connection with the institution and prosecution of the claim, . . .

When the Contingent Fee Rule was promulgated, the Director of the Administrative Office of the Courts issued a notice to the bar emphasizing this policy:

"The Supreme Court considers that [the limits set forth in R. 1:21-7(c)] apply to any Contingent Fee arrangement in a tort matter entered into by a New Jersey attorney, without regard to the Court in which an action may subsequently be filed, and to any participation by a New Jersey attorney in a Contingent Fee arrangement entered into outside the State of New Jersey with respect

to litigation in this State. This is not intended to deny the authority of the Federal Courts to apply a different standard to implement some other Federal policy." (Quoted in *Bernick v. Frost*, 210 N.J. Super. at 404, 510 A.2d at 60.)

This Rule was promulgated pursuant to New Jersey's strong interest in regulating the economic relationship between New Jersey Attorneys and their clients in tort cases. It was intended to have extraterritorial effect only in regard to New Jersey Attorneys. As a statement of public policy it also has extraterritorial impact on contracts executed by attorneys of any state where the executed contract is with a resident of the State of New Jersey and when the contract is executed under such circumstances that would give rise under "Choice of Law" doctrines to the application of New Jersey Law.

That is the factual situation in this case. The plaintiffs were New Jersey Residents, the contract was executed in their home and the contract related to recovery for personal injuries to plaintiff which arose out of an accident which occurred in New Jersey.

Although, it may be possible that a factual pattern could arise wherein a judicial decision applying New Jersey Law to a contract between an attorney and a New Jersey client would have extraterritorial effect, it should be emphasized however, that this is not the factual scenario in the instant case.

The attorney who signed the contract with plaintiffs in this case is in fact a licensed New Jersey Attorney and as such, is subject to the Rules of the New Jersey Supreme Court. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 95 S.Ct. 2004,

44 L.Ed. 572, (1975). *Cohen v. Hurley*, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156, (1961).

It should also be noted that six of the eight members of the Petitioners Law Firm at the time of this action held themselves out as licensed to practice law in the State of New Jersey. Their letterhead also boldly claims that they were affiliated with a Law Office in New Jersey. The attorney, Robert J. Mongeluzzi, who solicited the Respondents and came to their home in New Jersey to counsel them, and came to New Jersey to negotiate with and give advice to Respondents in regard to their tort case, was a New Jersey Licensed Attorney. This clearly is not Commerce taking place wholly outside of the State's borders.

Petitioner voluntarily chose to solicit the business of the New Jersey resident Respondents by calling them and again visiting their home to counsel and advise them about their tort matter prior to negotiating a Contingent Fee agreement with Respondents.

Based on the uncontroverted facts in this case it is impossible to mount an argument that the decision of the Courts below have "the practical effect" of regulating commerce occurring wholly outside the State's borders. Consequently, the decision does not violate the Commerce Clause. *Healy v. Beer Institute, Inc.*, 491 U.S. 324,109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). The uncontroverted facts that the New Jersey Attorney who executed the contract with plaintiffs and performed most of the services for them held a New Jersey License to practice law, that the plaintiffs resided in New Jersey and that Mr. Newcomb's injury occurred in New Jersey all lead to the

inescapable conclusion that this was a New Jersey Contract and that the trial court's decision did not have an impermissible extraterritorial effect.

This petition for writ for certiorari should be denied because the Court in this matter is faced with a very fact intensive situation. The only real questions Petitioner raises in its petition turn on the particular facts of this case alone and are of interest only to the parties to it.

This Court has ruled that fact canvassing is not a task to be served by certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the Courts below are treated with and entitled to great weight. In the present case, Petitioner raises only questions turning entirely on the facts of this case, already resolved in favor of Respondents and without any impact outside the limits of the case. Certiorari, therefore, should be denied.

## CONCLUSION

The judgment order of the United States Court of Appeals for the Third Circuit, affirming the Summary Judgment entered by United States District Court for the District of New Jersey is not in direct contravention of decisions of this Court interpreting the Commerce Clause of the United States Constitution. It is in complete accord with the decisions of this Court. The Petition for a writ of certiorari should therefore, be denied.

Respectfully submitted,

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